

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection	)	
Act of 1991	)	CC Docket No. 92-90

To: The Commission

**COMMENTS OF BRUNSWICK CORPORATION**

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## **EXECUTIVE SUMMARY**

Brunswick Corporation (“Brunswick”) respectfully requests that the Commission adopt explicit safe harbors for what qualifies under the Telephone Consumer Protection Act (“TCPA”) as “prior invitation or permission” for the sending of fax advertisements. Such safe harbors could clearly delineate certain circumstances in which businesses can be confident that they have received an invitation or permission to send a fax advertisement. The Commission could continue to evaluate on a case-by-case basis whether a fax advertisement is unsolicited if the circumstances do not fit within the safe harbors.

Due to the lack of specific guidelines as to whether a fax is “unsolicited” under the TCPA, some businesses have inadvertently violated the TCPA or, alternatively, refrained from exercising their rights to free speech and legitimate marketing activities because they are concerned that sending any fax advertisements could result in a lawsuit or other enforcement action brought under the TCPA. In addition to helping businesses avoid inadvertent violations of the TCPA’s unsolicited fax prohibition and the chilling of legitimate business practices, a safe harbor approach also would benefit consumers by making it less likely that they will receive unsolicited faxes from entities that do not have sufficient guidance to determine whether its faxes are permissible. A safe harbor approach also would conserve Commission resources by reducing the number of cases in which the Commission will be called upon to conduct an investigation and enforcement action.

For these reasons, as further explained herein, Brunswick urges the Commission to adopt safe harbors that encompass all legitimate business practices through which a business may be invited or given permission to send a fax advertisement.

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**I. INTRODUCTION**

Brunswick Corporation (“Brunswick”), by its attorneys and pursuant to Section 1.415 of the rules of the Federal Communications Commission (“Commission”), 47 C.F.R. § 1.415, hereby submits these comments (“Comments”) in response to the notice of proposed rulemaking (“NPRM”) issued by the Commission in the above-captioned proceeding.<sup>1</sup> In the NPRM, the Commission sought comment on whether to revise or clarify its rules implementing the Telephone Consumer Protection Act (“TCPA”). The TCPA governs telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile (“fax”) machines for promotional purposes. Specifically, Brunswick is interested in the Commission’s interpretation and implementation of the TCPA’s prohibition on the sending of commercial advertisements via fax, unless a recipient of such a fax has invited or given permission to the sender.

In implementing the TCPA, the Commission declined to adopt a standard definition as to what constitutes “prior permission or invitation” that would allow a commercial entity to send a fax advertisement under the TCPA.<sup>2</sup> Instead, the Commission opted to consider the question of whether a fax advertisement is “unsolicited” on a case-by-case basis.<sup>3</sup> Due to the lack of specific guidelines as to whether a fax is “unsolicited” under the TCPA, some businesses have inadvertently violated the TCPA or, alternatively, refrained from exercising their rights to free speech and legitimate marketing activities because they are concerned that sending any fax advertisements could result in a lawsuit or other enforcement action brought under the TCPA.<sup>4</sup> As noted in the legislative history of the TCPA, it is fax advertisers that are “responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages.”<sup>5</sup> This is a daunting task for many fax advertisers, particularly smaller businesses that cannot afford substantial legal fees to analyze whether an advertisement may be sent and to whom.

Because of the potential that significant sanctions or damages will be imposed, even in the case of the inadvertent sending of unsolicited faxes, and the corollary risk that legitimate and effective marketing practices will be chilled because of the risk of lawsuits or enforcement

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<sup>1</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90, *Notice of Proposed Rulemaking and Memorandum Opinion and Order* (rel. Sept. 18, 2002) (“NPRM”).

<sup>2</sup> See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 FCC Rcd 12391, CC Docket No. 92-90, *Memorandum Opinion and Order* (1995) (“MO&O”) at ¶ 37.

<sup>3</sup> See id.

<sup>4</sup> See, e.g., Protecting Your Company Against Unsolicited-Fax Lawsuits, *Circulation Management*, May 1, 2002; Know the Facts Before Sending a Fax, *Circulation Management*, Nov. 1, 2002. See also From Filtering Email to Filing Lawsuits, Network Administrators Have an Arsenal of Weapons for Wrestling Spam, *Network Magazine*, May 1, 2002; Junk Faxes, Spam Subject to Telemarketing Laws, *Marketing News*, Apr. 26, 1999.

<sup>5</sup> See S. Rep. No. 102-78, at 8 (1991).

actions, businesses that use fax advertising would benefit greatly from the adoption of more specific guidelines regarding unsolicited faxes under the TCPA.<sup>6</sup> Rather than adopting a standard definition under which a fax would be considered “unsolicited” under the TCPA, Brunswick urges the Commission to adopt safe harbors for what qualifies as “prior invitation or permission” for the sending of fax advertisements. Such safe harbors could clearly delineate certain circumstances in which businesses can be confident that they have received an invitation or permission to send a fax advertisement. If a business sends a fax advertisement based on a situation that meets one or more of the safe harbors, there will be no violation of the TCPA. The Commission could continue to evaluate on a case-by-case basis whether a fax advertisement is unsolicited if the circumstances under which the sender claims invitation or permission does not fit within the safe harbors.

In addition to helping businesses avoid inadvertent violations of the TCPA’s unsolicited fax prohibition, this approach also would benefit consumers by making it less likely that they will receive unsolicited faxes from entities that do not have sufficient guidance to determine whether its faxes are permissible. A safe harbor approach also would conserve Commission resources by reducing the number of cases in which the Commission will be called upon to conduct an investigation and enforcement action. Further, to the extent that the Commission as the primary implementing agency of the TCPA is called upon to handle a TCPA matter referred by a court pursuant to the doctrine of primary jurisdiction, the Commission will have an established set of guidelines to which it can refer in handling the matter. Courts that adjudicate TCPA cases and do not refer such matters to the Commission on primary jurisdiction also would

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<sup>6</sup> Under the TCPA, consumers and state attorneys general may bring private causes of action and obtain triple damages and \$500 per infraction. 47 U.S.C. § 227(c)(5). The Commission also may fine companies as much

benefit from having a Commission interpretation to which they could refer. For these reasons, as further explained below, Brunswick urges the Commission to adopt safe harbors that encompass all legitimate business practices through which a business may be invited or given permission to send a fax advertisement.

## **II. BRUNSWICK CORPORATION**

Brunswick is the world's largest seller of marine engines and pleasure boats, and the world's largest manufacturer of bowling equipment, billiards tables, and commercial fitness equipment.<sup>7</sup> Brunswick also is one of the largest manufacturers of consumer fitness equipment. Brunswick is an interested party in this proceeding because its three main lines of business – marine engines, boats, and fitness and recreation – utilize fax advertising as one method to attract new and repeat customers. Brunswick therefore is concerned with the rules governing such practices and seeks to balance its business interests and right to free speech with its existing and potential customers' concerns regarding privacy.

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as \$11,000 per infraction of its rules. See 47 U.S.C. § 503(b)(1). See, e.g., *Fax.com, Inc., Notice of Apparent Liability for Forfeiture*, File No. EB-02-TC-120, FCC 02-226 (rel. Aug. 7, 2002).

<sup>7</sup> Brunswick manufactures and markets marine engines under the brand names Mercury, Mariner, Mercury MerCruiser, Mercury Racing, Mercury SportJet and Mercury Jet Drive. Brunswick also manufactures and sells boats under the brand names Hatteras, Sea Ray, Bayliner, Maxum, Sealine, Boston Whaler, Trophy, Baja, and Princecraft. Brunswick designs, markets, and manufactures a full line of cardiovascular fitness equipment and strength-training fitness equipment under the Life Fitness, Hammer Strength, and ParaBody brand names. Life Fitness sells to health clubs, gyms, professional sports teams, military, government, hospitality, corporate, and educational facilities. Life Fitness also is a leading seller in the high-end consumer market. Brunswick is the leading manufacturer and designer of bowling products, including bowling balls, after-market products and parts, and capital equipment. Brunswick operates 121 family bowling centers in the United States, Canada, and Europe, which offer bowling and, depending on size and location, billiards, video games, pro shops, children's playrooms, conference rooms for meetings and parties, restaurants, and cocktail lounges. Twenty-one of its centers in North America recently have been converted to Brunswick Zones, which are state-of-the-art facilities featuring enhanced recreational elements and media. Finally, Brunswick designs and markets billiards tables, billiards balls, cues, and related accessories under the Brunswick brand.

The breadth and depth of Brunswick's products and customer base are directly relevant to Brunswick's Comments in the instant proceeding. As a fax advertiser in its various lines of business, Brunswick believes that the instant proceeding presents a valuable opportunity to secure better guidance from the Commission with respect to the boundaries of the TCPA. Brunswick has become aware generally, and through its own experience with pending litigation, that the current lack of specificity regarding prior invitation or permission is harmful to businesses such as Brunswick.

### **III. THE COMMISSION SHOULD ADOPT SAFE HARBORS FOR ESTABLISHING PRIOR PERMISSION OR INVITATION, INCLUDING SAFE HARBORS FOR ESTABLISHING PRIOR BUSINESS RELATIONSHIPS**

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The TCPA prohibits the transmission of "unsolicited advertisements" via fax.<sup>8</sup> Under the TCPA, in order for a sender to send an advertisement via fax, a recipient must invite or give permission to receive an advertisement via fax.<sup>9</sup> Although the TCPA defines "unsolicited advertisement," the TCPA does not define what would constitute "invitation or permission" that would render an otherwise impermissible fax advertisement permissible. The Commission, in interpreting the TCPA, declined to define "invitation or permission" and determined that, given the variety of ways in which fax numbers can be distributed, it would be more appropriate to treat on a case-by-case basis the issue of whether invitation or permission had been granted.<sup>10</sup>

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<sup>8</sup> Section 227(b)(1)(C) provides that "It shall be unlawful for any person within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

<sup>9</sup> See S. Rep. No. 102-78, at 8 (1991).

<sup>10</sup> See MO&O at 38. Although the Commission did not define "invitation or permission," the Commission determined that the existence of a "prior business relationship" between sender and recipient is one way in which the necessary consent may be established. The Commission did not define "prior business relationship" for purposes of



Brunswick believes, generally and from its own experience, that this case-by-case approach, with no specific guidelines, has harmed businesses that seek to engage in legitimate fax advertising. First, a business may inadvertently violate the TCPA prohibition on unsolicited faxes because the business believes it has received prior invitation or permission but the Commission or a court later finds that there was no invitation or permission. The business would be subject to damages of at least \$500 per infraction, or forfeitures of up to \$11,000 per infraction, even if it believed in good faith that its actions were lawful. A business may be forced to defend itself against a Commission enforcement action without a clear understanding of how the Commission will rule in such action, or to defend itself against a lawsuit without the benefit of Commission guidance that could be persuasive to a court in its holding or in a decision to refer the matter to the Commission for primary jurisdiction. Second, when faced with even a possibility of a lawsuit or enforcement action, a business may decide to avoid fax advertising entirely, even if it previously has found such advertising to be an effective means of attracting and retaining customers. The Commission's case-by-case approach therefore has chilled the exercise of free speech and legitimate business practices.

The case-by-case approach also has harmed consumers by continuing to make it likely that they would receive unsolicited faxes from entities that did not have sufficient guidance to determine whether its faxes were permissible. In addition, a consumer who believes he has received an unsolicited fax does not have clear guidelines by which to determine whether he has a legitimate cause of action against the sender. Finally, the case-by-case approach has wasted

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the TCPA's unsolicited fax prohibition, although it has defined "established business relationship" in its implementation of other TCPA provisions. 47 C.F.R. § 64.1200. See note 15, infra.

judicial and agency resources by requiring the adjudication of cases that could have been settled or avoided entirely if a clear set of guidelines had been in place.

A. The Commission should adopt safe harbors for prior invitation or permission

The Commission stated in the NPRM that its current review of the TCPA implementation rules was prompted in part by an increasing number and variety of inquiries and complaints involving its rules on unsolicited fax advertisements.<sup>11</sup> The Commission is, therefore, aware that both businesses and consumers have struggled to apply the TCPA and the Commission's rules to actual business practices. Consistent with the Commission's goal of enhancing consumer privacy protections while avoiding imposing unnecessary burdens on telemarketing, consumers, and regulators, the adoption of safe harbors will not detract from consumers' privacy protections, and will ease the burden on telemarketers and regulators with respect to determining when it is appropriate to send a fax advertisement.<sup>12</sup> Adopting safe harbors will provide clarity and guidance for both businesses and consumers, and will reduce the number of inquiries to the Commission as the implementing agency of the TCPA. Safe harbors also are likely to reduce the number of lawsuits and enforcement actions brought in the "gray" area where it currently is unclear whether a fax was "unsolicited."

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<sup>11</sup> NPRM at ¶ 8.

<sup>12</sup> See NPRM at ¶ 1.

- B. The scope of the safe harbors for establishing invitation or permission should encompass all legitimate business practices through which businesses reasonably believe they have obtained a consumer's consent

1. Safe harbors where fax contact information has been provided

The Commission should establish a set of safe harbors for circumstances where fax contact information has been provided by a recipient to a sender. The scope of the safe harbors should encompass all legitimate business practices while not infringing upon consumers' privacy. As a preliminary matter, Brunswick urges the Commission to clarify that the term "express invitation or permission" does not require a potential fax recipient to state, orally or in writing, that he or she would like to receive a fax advertisement. Rather, the requirement is that a sender reasonably believes, based on either a relationship with a recipient or the circumstances in which the recipient provided a fax telephone number, that the recipient reasonably knew he or she was likely to receive a fax from the sender, and did not object to the receipt of such fax.<sup>13</sup> There are a variety of circumstances in which the distribution or publication of a fax number reasonably indicates that the number may be used for commercial advertisements. Brunswick urges the Commission to adopt safe harbors that reflect the wide scope of these circumstances and establish that the provision of a fax telephone number by an individual directly to a business constitutes prior invitation or permission, unless the individual explicitly indicates that the number is not to be used for advertisements. These safe harbors are fair to businesses, who should not be expected to refrain from using fax numbers which they have been provided. These safe harbors also are fair to consumers. Telemarketing and fax advertising are widely used tools in marketing products in the United States. A person who provides a fax number to a

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<sup>13</sup> The Commission used similar reasoning in adopting the "prior business relationship" exemption, which provides that, in certain circumstances, an individual reasonably should assume that he is likely to receive a fax advertisement even if he does not expressly grant his consent to receive such advertisement. See MO&O at ¶ 37.

commercial entity realizes that he may receive faxes at that number from the company to whom he provided the number.<sup>14</sup>

The safe harbors should include, but not be limited to, circumstances in which a recipient:

Completes an inquiry card at a product or trade show, such as a boat show (visitors can put as little or as much information on the card as they want, and might choose not to fill out a card at all; if a visitor to one of Brunswick's booths completes a card and includes a fax number, it is more than reasonable to assume that that visitor expects there is a likelihood that he will receive a fax from Brunswick);

Inquires about products by leaving his business card, which contains fax contact information, at one or more booths at a product or trade show, such as a boat show;

Submits a warranty card, and includes fax contact information on such warranty card, for a product purchased by a commercial entity;

Leaves his business card, which contains fax contact information, in a bowl in order to win a drawing for a prize such as a free night of bowling (the primary purpose of the business-card-in-the-fishbowl practice is to collect contact information; there is no requirement to put one's card in the bowl, and it is not reasonable to believe that anyone putting their card in the bowl would not expect to be contacted).

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<sup>14</sup> Anyone who distributes their fax number to a commercial entity should recognize that it is possible that the fax number and other identifying information will be distributed to third-party entities. Nevertheless, faxes sent by third-party entities to whom the number was not directly distributed should not fall under this safe harbor. With the exception of publication in association or group directories, an individual is entitled to have use of his fax number limited to the entity to whom he gave the number.

The Commission also should adopt safe harbors to establish that a person who provides his fax number to be published in a group or association directory, or has provided such information for membership purposes in a club or organization that is sponsored by a commercial entity, has given permission to receive commercial faxes reasonably related to the purpose of the group or association. These safe harbors include, but should not be limited to, circumstances in which a recipient:

Provides fax contact information to be included in a directory for a group or association (for example, a sailing club or a bowling league);

Provides fax contact information for membership in a club or organization that is sponsored by a commercial entity (for example, Brunswick's Life Fitness brand might send advertisements to runners who have joined a local marathon training group that is sponsored by a Brunswick entity).

## 2. Safe harbors regarding prior business relationships

The Commission also should establish a set of safe harbors for circumstances where a prior business relationship exists and the sender is in possession of the recipient's fax number, irrespective of whether the recipient has directly provided the fax contact information to the sender. Although the Commission previously declined to enact specific standards regarding prior invitation or permission, the Commission did determine that a prior business relationship between the fax sender and recipient establishes the requisite consent for a fax advertisement.<sup>15</sup>

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<sup>15</sup> MO&O at ¶ 37. For purposes of its rules implementing other provisions of the TCPA, the Commission has defined an "established business relationship" to mean a "prior or existing relationship formed by a voluntary two-way communication between a person or entity and [an individual] with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction . . . regarding products or services

As the Commission noted, this determination effectively created an exemption under the TCPA for prior business relationships.<sup>16</sup> Brunswick urges the Commission to retain this implicit exemption, reframed as an explicit safe harbor. This safe harbor should state that, where a prior business relationship exists, even if no fax number has been provided by the customer, a sender has received consent to send a fax advertisement to the recipient. The safe harbor should then list a number of different ways in which a prior business relationship may be established. Specifically, the safe harbor should provide that a fax advertisement may be sent to any individual who:

Makes an inquiry requesting information on any product or service offered by the fax sender (such inquiry could be via telephone, in writing, over email, or in person, and must merely indicate an interest in receiving information regarding a product or service);

Submits an application regarding any product or service offered by the fax sender;

Purchases any product or service offered by the fax sender (it is clear that if Brunswick has sold a boat that a business relationship has been established between the individual and Brunswick that includes not just the type of boat purchased or inquired about, but Brunswick's entire boat division and its marine engine line; in some circumstances, a relationship may be created that includes all Brunswick product lines);<sup>17</sup>

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offered by such person or entity, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200. Brunswick urges the Commission to adopt safe harbors that encompass this definition for purposes of determining whether a prior business relationship exists that permits the sending of faxes.

<sup>16</sup> MO&O at ¶ 37.

<sup>17</sup> An ongoing relationship in which a particular customer continues to return to Brunswick to purchase certain goods suggests that the customer likes the Brunswick brand. As such, it is fair to say that a business relationship has been created between the company and the customer, and that anything the company is selling may

Engages in any transaction regarding any product or service offered by the fax sender  
(this could involve planning a corporate or special event at a bowling alley or receiving  
service on equipment).

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be of interest to the customer. A purchaser with the money to buy a pleasure boat likely is in the high-end retail market for a product such as a treadmill or a billiards table.

### **III. CONCLUSION**

The TCPA provides that individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that both protects the privacy of individuals and permits legitimate telemarketing practices. The revisions to the Commission's rules proposed herein would not compromise the privacy of any individual or any public safety interest, but would further businesses' ability to engage in legitimate telemarketing practices without the burden of exhaustive, case-by-case analyses regarding the legality of their fax advertising practices. The safe harbor approach also would alleviate the chilling effect of the current case-by-case approach. Brunswick therefore urges the Commission to adopt safe harbors for invitation and permission that will enable businesses and consumers to rely on established guidelines, while allowing the Commission to continue to evaluate the issue of consent, outside of such safe harbors, on a case-by-case basis.

Respectfully submitted,

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